No. 221

Supreme Court of the United States

OCTOBER TERM, 1949

SKELLY OIL COMPANY, STANOLIND OIL AND GAS COMPANY, and MAGNOLIA PETROLEUM COMPANY,
Petitioners,
VERSUS
PHILLIPS PETROLEUM COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

Michigan-Wisconsin Pipe Line Company proposed a natural gas pipe line system extending from the Hugoton Gas Field, located in Texas, Oklahoma, and Kansas, to points of connection with distribution systems in the States of Michigan and Wisconsin, or either of them, and at intermediate points (R. 169, 36, 39). To support such a project, the initial cost of which is in excess of $50,000,000.00 (R. 496), it was of course necessary that large reserves of gas be first assured.

The respondent, Phillips Petroleum Company, had gas leases covering approximately 430,000 acres in the field mentioned (R. 14, 15, 491). In the month of December, 1945, Phillips was negotiating a contract with Michigan-Wisconsin whereby Phillips was to make available to Michigan-Wisconsin the required gas reserves, not only by dedicating its own acreage but also by dedicating acreage of other companies with which it was to enter into gas purchase contracts. Accordingly, Phillips entered into contracts with four producing companies, consisting of the three petition-

ers and another producing company[1], whereby those companies contracted to sell to Phillips gas from leases owned by them separately and covering in all approximately 200,000 acres for the recited purpose of enabling Phillips to make available to Michigan-Wisconsin the required reserves and supplies of gas to justify and support the proposed pipe line system (R. 170, 38, 59). At the same time, the contracts made possible a market to the petitioners, as well as to Phillips, for the gas to be produced from the large acreage involved.

Within a few days after entering into the contracts with the petitioners, Phillips consummated its contract with Michigan-Wisconsin dedicating its acreage and that of the petitioners to the proposed pipe line project (R. 11).

The Natural Gas Act provides that no company which is to transport natural gas in interstate commerce shall construct, acquire or operate any facilities therefor unless there has been issued to it by the Federal Power Commission a certificate of public convenience and necessity. Portions of the Act are attached as Appendix A. That Act provides not only that the Federal Power Commission shall have continuing control of phases of the conduct and operation of interstate gas pipe lines but also that it shall first determine whether the public necessity and convenience requires that a new interstate pipe line be built, and, if the Commission decides that it does and that a particular applicant is able to perform the service, a certificate of public convenience and necessity is to be issued accordingly. If it is not so determined, the new line cannot be built.

In each of the contracts between Phillips and the petitioners it was recited that Michigan-Wisconsin desired "to

[1]This company did not endeavor to terminate its contract and therefore no further reference will be made to it.

obtain from the Federal Power Commission a certificate of public convenience and necessity *under the requirements of the Natural Gas Act* for a pipe line system"[1] as described above "and in order to obtain said certificate it is necessary that it have made available to it, adequate reserves of natural gas." In fact, the contract with each of the petitioners begins with that recitation (R. 36, 59).

It remained to be seen whether the Commission would determine that the public convenience and necessity required the proposed pipe line project, or some part thereof. There was inserted in the petitioners' contracts a provision to the effect that if a certificate of public convenience and necessity had not been issued by December 1, 1946, the petitioners would have the right to terminate by delivery of notice of termination at any time thereafter, "but before the issuance of such certificate." Article II, Section 2 of each of the contracts (R. 41, 59).

A prolonged hearing upon the application of Michigan-Wisconsin for a certificate of public convenience and necessity was had before the Commission involving many months of evidence and argument as to whether the proposed pipe line project was necessary in the public interest and whether the reserves in the United States and those dedicated to the proposed project were such as to justify this new project (R. 394). As a result, the Commission on Saturday, November 30, 1946, decided the matter in favor of Michigan-Wisconsin (R. 172, 439). On that date it found and determined that the public necessity required the new pipe line project and that Michigan-Wisconsin was able to perform the service (R. 441). On that date it made and adopted in full its order wherein it was ordered that "a

[1] All emphases in this brief are ours unless otherwise indicated.

certificate of public convenience and necessity be *and it is hereby issued* to Applicant," Michigan-Wisconsin (R. 441). As is the practice of the Commission, and as provided for in the Natural Gas Act, certain conditions were imposed.

Notwithstanding the action and order of the Commission on November 30, 1946, issuing a certificate, the petitioners saw fit to serve upon the respondent on the next business day, December 2, 1946, telegraphic notices whereby the petitioners endeavored to terminate their contracts under the terms of Article II, Section 2 of the contracts upon the claim that a certificate of public convenience and necessity had not been obtained (R. 173, 605-606). By such notices the petitioners sought to withdraw completely the gas reserves which they had dedicated to the pipe line project by their contracts. The respondent refused to recognize such notices as terminating the contracts (R. 8, 9, 109, 126, 136).

Two of the petitioners, Stanolind and Skelly, filed separate suits in a state district court at Austin, Texas, against Phillips wherein they sought to have it adjudged that their respective contracts had been terminated. The petitioner, Magnolia, did not file suit. It is a Texas corporation (R. 168, 674). Phillips endeavored to remove the suits (R. 79, 90) but in the instant case there is no showing that the jurisdiction of the Federal Court in Texas was invoked or that the suits did not remain state court suits, as in fact they did. The attempt to remove was ineffective.[1]

[1]The federal court in Texas held that the removal papers were filed later than the hour specifed in the summons, but ruled that a federal question was presented by the complaints so as to give federal court jurisdiction; this, notwithstanding the studious attempt of the two petitioners to avoid showing the true and in turn, federal nature of the controversy (R. 69, 77, 82-88). Such holding, which was made prior to the decision on the merits in the instant case, is reflected in the memorandum opinion of the Texas court attached hereto as Appendix B.

In order to properly present the true controversy, and to have that controversy tried out in one suit involving all interested parties in a more appropriate forum, Phillips instituted this action for declaratory judgment in the United States Court for the Northern District of Oklahoma.

Phillips alleged in its complaint (R. 2) and the amendment thereto (R. 103) that a certificate of public convenience and necessity had been issued by the Federal Power Commission under the requirements of the Natural Gas Act on November 30, 1946, and hence that the petitioners had no right to terminate. There was attached a copy of the order of the Commission which respondent alleged constituted the issuance of a certificate such as was contemplated by, and provided for in, the Act (R. 105, 439). It was alleged that although the Commission adopted the order in full, final and exact text and caused notice to be given on November 30, 1946, the order was not mechanically reproduced by the secretary and full text copies handed out until the next business day, December 2, 1946 (R. 104, 105). Respondent alleged that such was in accord with the procedure of the Commission and under the provisions of the Natural Gas Act, particularly Section 717n(b) and Section 717o, constituted the then "issuance" of a certificate (R. 105). It was alleged that the petitioners contended and asserted otherwise and in so doing they failed to properly construe, or to give appropriate effect to, the Act and the rules, regulations and procedure of the Commission in effect pursuant to the terms of the Act (R. 105). Respondent alleged that the order of November 30, 1946, contained conditions but that they were such as were contemplated and provided for in the Act, particularly Section 717f(e), and the order as so made constituted the then issuance of a certificate under the requirements of the

Natural Gas Act (R. 106).[1] Respondent alleged that the petitioners contended and asserted otherwise and refused to recognize the order of the Commission as being within the requirements of the Natural Gas Act and, again, misconstrued and misapplied the Act (R. 9, 106). It was alleged that the actions of petitioners in endeavoring to terminate their contracts as they did on December 2, 1946, necessarily brought into play and called for the construction of the Act and the effect to be given to it (R. 10, 106) and that if the Act be given proper construction and appropriate effect the action of the Commission on November 30, 1946, did constitute the issuance on that date of a certificate of public convenience and necessity under the requirements of the Natural Gas Act (R. 10, 106). Judgment was prayed for decreeing that the Commission did on November 30, 1946, issue a certificate of public convenience and necessity in accord with the requirements of the Natural Gas Act prior to the notices of termination given by the petitioners and, consequently, that such notices were not effective and the contracts were not terminated (R. 10).

The trial court found and concluded that the Federal Power Commission intended to and did in fact issue a certificate of public convenience and necessity to Michigan-Wisconsin on November 30, 1946, and that although the certificate contained terms and conditions, it was one issued on that date "under the requirements of the Natural Gas Act"—"one that is provided for in that act," and consequently that the contracts had not been effectively terminated (R. 172-173, 176-177). A declaratory judgment was entered accordingly for the respondent (R. 177). The Court of Appeals affirmed [R. 707-728, 178 Fed. (2d) 89].

[1] In fact, construction of the extensive project was commenced under the authorization given by the certificate of November 30, 1946 (R. 602, 189-190).

SUMMARY OF ARGUMENT

1. The District Court had jurisdiction. The decision of the Court of Appeals so holding is in accord with the decisions of this Court.

2. There is no conflict between the decision of the Court of Appeals in this case and the order of the Court of Appeals for the District of Columbia made on April 21, 1947, in its case No. 9482, *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission.*

3. The decision of the Court of Appeals upon the merits properly construes and applies the Natural Gas Act and gives appropriate effect to the order of the Federal Power Commission of November 30, 1946, issuing on that date a certificate of public convenience and necessity. There is no conflict between that decision and any decision of this Court or of any Court of Appeals.

4. The trial court did not abuse its discretion in declining to dismiss this action. The decision of the Court of Appeals so holding conflicts with no other decision of a Court of Appeals and is in accord with the decisions of this Court.

ARGUMENT

1. The District Court had jurisdiction.

Jurisdiction of the District Court over the subject matter of this declaratory judgment action is based upon Section 24 of the Judicial Code, which gives to the United States District Courts jurisdiction of all suits of a civil nature where the matter in controversy exceeds the sum

or value of $3,000.00 and "arises under the Constitution or laws of the United States" (R. 103-106, 169).[1]

From the face of the complaint as amended it is apparent that only one basic controversy was presented and that was whether a certificate of public convenience and necessity under the requirements of the Natural Gas Act was issued prior to December 2, 1946 (R. 3-11, 103-106). Determination of that question depended upon the construction and application to be given to the Act and the *rules and regulations* of the Federal Power Commission.

Petitioners here dispute jurisdiction, as they did below, on the assertion that the federal question, the basis for federal jurisdiction, does not appear upon the face of the complaint or amendment thereto, except by way of anticipation of a defense. Neither the Court of Appeals nor the District Court failed to give recognition to the rule referred to by petitioners but, following decisions of this Court, held the rule inapplicable here (R. 720).

As a matter of proper pleading, the federal question in this case would affirmatively appear in any action which Phillips might have brought to protect its rights. Allegations regarding the provisions of the contract and the serving of the termination notices would be required to

[1]Additionally as to Magnolia Petroleum Company jurisdiction was asserted on diversity of citizenship, Phillips being a Delaware corporation and Magnolia a Texas Corporation (R. 103, 104, 168, 169). The three separate causes of action of Phillips against Skelly, Stanolind and Magnolia who each made separate contracts, were combined under Rule 20(a) of the Federal Rules of Civil Procedure because the right to relief arose out of the same transaction or series of transactions, and involved common questions of law and fact. "The causes remain as separate and distinct as if commenced separately." **Lansburg & Bro. v. Clark** (App. D. C.), 127 F. 2d 331. See also **Fechheimer Bros. Co. v. Barnwasser** (6 Cir.), 146 F. 2d 974; **Diepen v. Fernow** (D. C. Mich.), 1 F. R. D. 378; **Nat'l Surety Corp. v. City of Allentown** (D. C. Pa.), 27 F. Supp. 515; **Sturgeon v. Great Lakes Steel Corp.** (6 Cir.), 143 F. 2d 819. See also R. 243. If there were no federal question presented in this litigation the judgment as to Magnolia should not be disturbed. See **Camp v. Gress**, 250 U. S. 308; **Wells v. Universal Pictures Co.** (2 Cir.), 166 F. 2d 690, 693.

state any cause of action. When these facts are pleaded, obviously no relief can be claimed without further pleading that the termination notices were not effective because, if the Act be properly construed and applied to the facts relative to the action of the Commission, there was a certificate under the requirements of the Act issued prior to delivery of the notices. Such pleading would raise the federal question without anticipating a defense.

Moreover, if is deemed immaterial whether or not in some other type of action it would be necessary to show the federal question in pleading the plaintiff's claim for relief. Under the Declaratory Judgment Act the complaint must disclose an actual, justiciable controversy. The plaintiff must set forth his claim and the basis therefor and the defendant's claim and the basis thereof. The plaintiff is not thereby anticipating a defense but instead is showing, as he must, the *controversy* and that the plaintiff is entitled to have the controversy adjudicated in his favor. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 272; *Nashville, C. & St. P. Ry. Co.* v. *Wallace*, 288 U. S. 249, 260; *United Public Works of America* v. *Mitchell*, 330 U. S. 75, 89.

This Court has held that if in the type of action which a plaintiff brings it is proper for him to show that a determination of the action involves the construction and application of a federal law, federal jurisdiction exists although had the plaintiff brought another type of action based upon the same facts the allegations would be in anticipation of a defense and not supportive of federal jurisdiction. *Lancaster* v. *Kathleen Oil Co.*, 241 U. S. 551; *Hopkins* v. *Walker*, 244 U. S. 486. The analogy of those decisions to the case here is singular.

The *Lancaster* case, *supra*, involved conflicting oil and gas leases obtained from Indian heirs. In his action for possession and injunctive relief, the plaintiff alleged that under certain federal laws his lease was valid and the defendant's lease was invalid. As to showing of federal jurisdiction, the defendant asserted the same rule as petitioners assert here, contending that in an ejectment action it was necessary to allege only "a right of possession by the plaintiff and a wrongful possession by the defendant" and hence the other allegations were allegations in anticipation of a defense and in refutation of anticipated assertions to be made by the defendant. This Court renounced the argument pointing out that the "object of the suit was not only to recover possession but also an injunction" and "Such relief, it is apparent, could be granted only after determining the rights of the parties under their respective leases, which would require a construction of an act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving the defendant company's lease, and the effect to be given such approval." 241 U. S. 551, 555. Although this case was cited by the Court of Appeals in support of its holding here (R. 720), we find no mention of it in petitioners' brief in this Court.

Hopkins v. *Walker*, *supra*, was a suit to quiet title to a placer mining claim in which the plaintiffs alleged the claims of the defendants and their invalidity under the federal mining laws. The defendants asserted that the federal question was presented only in anticipation of a defense but this Court held otherwise pointing out that: "It hardly requires statement that in such cases [suits to remove specific claims on plaintiff's title] the facts showing

the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action." 244 U. S. 486, 490.

None of the cases cited by petitioners deals with the problem of whether the plaintiff can show federal jurisdiction by reason of affirmative allegations in a declaratory judgment action which would be an anticipation of a defense in any other action arising from the same state of facts. The requirement that the substantive basis for jurisdiction, *i. e.*, the existence of a federal question, must appear, from the plaintiff's complaint unaided by allegations in anticipation or avoidance of a defense is a matter of pleading and is therefore procedural. The decisions relied upon by petitioners are only to the effect that the Declaratory Judgment Act is *procedural* in that it does not create any additional *substantive* basis of federal jurisdiction. It does not follow that the procedural changes wrought by that Act may not permit the pleading of a claim for relief which will be within the jurisdiction of the federal courts, provided as here the substantive basis for jurisdiction exists, although jurisdiction may not have been invoked in another type of action.[1]

This action being one wherein the Natural Gas Act was to be construed and applied and the controversy determined accordingly was one arising under a law of the United States; not, as petitioners contend, under state law. Thus the substantive basis for federal jurisdiction exists. The determination of the controversy here, that is,

[1] **Davis v. American Foundry Equipment Co.** (7 Cir.), 94 F. 2d 441; **Guardian Life Ins. Co. of America v. Kortz** (10 Cir.), 151 F. 2d 582; **C. E. Carnes & Co., Inc. v. Employers' Liability Assur. Corp.** (5 Cir.), 101 F. 2d 730; **Home Insurance Co. v. Trotter** (8 Cir.), 130 F. 2d 800; **Aralac, Inc. v. Hat Corp. of America** (3 Cir.), 166 F. 2d 280, fn 9, 292.

whether the action of the Commission on November 30, 1946, constituted the then issuance of a certificate under the requirements of the Natural Gas Act involved a number of more specific questions to be decided: Does the provision in the Act to the effect that the Commission shall "decide" an application for a certificate mean that the Commission must find only two facts before it is empowered to issue a certificate, namely, the ability of the applicant to perform the proposed service and the public necessity for the project, rather than determine all matters presented by the application and pertaining to the project, such as rates to be charged? In order for an applicant under the Act to be "able and willing" to perform the proposed service must it have obtained authorizations required by other laws from other bodies? Under the Act, is the "issuance" of a certificate made when the Commission makes its order containing the necessary findings and "granting" the application rather than when the order is mechanically reproduced and handed out to the parties? Does the act permit the present issuance of a certificate although conditions are imposed? Under the statute is acceptance by an applicant a prerequisite to the issuance of a certificate?

At an early date, CHIEF JUSTICE MARSHALL stated the following test for determining whether or not a case "arises under" a statute of the United States:

> "A case in law or equity consists of the right of one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either." *Cohens v. Virginia*, 6 Wheat. 264, 379.

CHIEF JUSTICE MARSHALL also said that an action arises under the Constitution or law of the United States when:

"* * * the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction. * * *" *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 822.

Since these decisions were announced this Court has consistently applied this basic test:[1]

The contention of petitioners that notwithstanding the fact that the determination of the controversy here necessitates the construction and application of an act of Congress, nevertheless the federal courts have no jurisdiction to adjudicate the controversy because the determination of that controversy controls contracts between the parties is clearly repudiated by the decisions of this Court in *Smith* v. *Kansas City Title & Trust Company*, 255 U. S. 180, and *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 320, 321, as well as the other decisions above cited. The holding in *Gully* v. *First National Bank*, 299 U. S. 109, was not contrary to those decisions. In the *Gully* case the Court was confronted with a situation where the possible question of federal law was too contingent and remote to support federal jurisdiction; there was no "necessary connection" between the existence of a controversy arising under federal law and the contract there involved; and "The most that one can say is that a question of federal

[1] **Little York Gold Washing and Water Company v. Keyes**, 96 U. S. 199, 201 (1878); **Pennessee v. Davis**, 100 U. S. 257, (1880); **New Orleans M & T RR Co. v. Mississippi**, 102 U. S. 135 (1880); **White v. Greenhow**, 114 U. S. 307 (1885); **Starin v. New York City**, 115 U. S. 248 (1885); **Cooke v. Avery**, 147 U. S. 375, 384-9 (1893); **Northern Pacific R. Co. v. Soderberg**, 188 U. S. 526, 531 (1905); **Macon Grocery Company v. Atlantic Coast Line Railway Company**, 215 U. S. 501 (1910); **Hull v. Burr**, 234 U. S. 712 (1914); **Smith v. Kansas City Title & Trust Co.**, 255 U. S. 180 (1921); **Peyton v. Railway Express Company**, 316 U. S. 350 (1942); **Standard Oil Company v. Johnson**, 316 U. S. 481 (1942); **Tunstall v. Brotherhood of Locomotive F. E.**, 323 U. S. 210 (1944); **Bell v. Hood**, 327 U. S. 678 (1946).

For text authorities applying the rule as stated see Cyclopedia of Federal Procedure, Second Edition, Sec. 170 and 322; Hughes Federal Practice, Sec. 535; Dobie on Federal Procedure, Sec. 60, p. 164; 54 C. J. 231.

law is lurking in the background." 299 U. S. 109, 114, 117. *Starin* v. *New York*, *supra*, 115 U. S. 248, and *First National Bank* v. *Williams*, *supra*, 252 U. S. 504, were cited with approval, and those cases followed and applied the long established rule originally enunciated by Chief Justice Marshall. Also, the holding in *Puerto Rico* v. *Russell & Company*, 288 U. S. 474, 483, did not overthrow the long established rule because, as this Court said in that case: "No question of interpretation or enforcement of the federal statute appears upon the face of the complaint." That what we have above asserted is correct is, we submit, shown by the more recent decisions of this Court recognizing and applying the rule upon which jurisdiction is here vested. *Standard Oil Company* v. *Johnson*, *supra*, 316 U. S. 481; *Peyton* v. *Railway Express Agency*, *supra*, 316 U. S. 350; *Bell* v. *Hood*, *supra*, 327 U. S. 678. See also the dissenting opinion of MR. JUSTICE FRANKFURTER in *Flournoy* v. *Weiner*, 321 U. S. 253, 271. The majority did not disagree, but decided the case on other grounds.

The holding in *National Mutual Insurance Co.* v. *Tidewater Transfer Company* (June 20, 1949), U. S. —, dealing with the 1940 Act of Congress providing for suits by or against citizens of the District of Columbia, is not in conflict with the holding of the Court of Appeals in this case nor can inferences from the opinions therein be made supportive of the petitioners' assertions. Here there is a "law question" other than one arising under state law; here is a controversy definitely "involving" a law of the United States, namely, the Natural Gas Act, the construction and effect to be given to it being decisive of the controversy presented for determination by this litigation. No such case was considered directly or by way of dictum in any of the opinions in the Tidewater Transfer Company suit.

2. No conflict exists between the decision of the Court of Appeals here and an order of the Court of Appeals for the District of Columbia.

There are presented here no "decision(s) in conflict" of the two appellate courts; the decision and the order mentioned were not and did not purport to be "on the same matter." Rule 38(b) of this Court.

Among the many cities and communities to be served by the extensive project proposed in the application of Michigan-Wisconsin were Detroit and Ann Arbor. Those cities were being only partially supplied by Panhandle Eastern Pipe Line Company. Michigan-Wisconsin proposed to augment that supply. Panhandle asserted that under its alleged "grandfather" rights it had the exclusive right to supply the two cities mentioned (R. 440, 508-511).

The Commission on November 30, 1946, found that (1) Michigan-Wisconsin was able and willing to perform the service proposed and that (2) the public convenience and necessity required the project (R. 441). The Commission found that not only was there a large demand elsewhere for the project (Finding 2, R. 439) but also that Panhandle had not adequately supplied the Detroit and Ann Arbor markets and could not do so, and that it was apparent that the supply in those two markets should be augmented in the public interest (Finding 3, R. 440). In its order of November 30, 1946, then issuing a certificate, several conditions were set forth. Among them was condition B(viii) which provided that gas was not to be sold from the system for "resale in Detroit and Ann Arbor except with due regard to the rights and duties of Panhandle Eastern in its established service for resale in Detroit and

Ann Arbor" under its existing contract (R. 444).[1] Instead of stopping with that restriction on the operation of the line, as it could have under its authority to condition the exercise of rights under a certificate, the Commission went further and provided that such rights and duties of Panhandle Eastern would be prescribed upon the bases set forth in the condition in a supplemental order to be issued for that limited purpose within a specified time (R. 444).

After so providing in condition B(viii), the Commission desired to render it unnecessary for Panhandle to take an appeal from the order granting a certificate until the supplemental order had been issued and the opinions filed in the case. This obviously was for the purpose of precluding the necessity of partial appeals encountered in *Northwestern Electric Co.* v. *Federal Power Commission* (9 Cir.), 125 Fed. (2d) 882. The Commission desired that Panhandle be permitted to take to the appellate court the entire proceeding insofar as its rights were concerned which were involved only in the Detroit and Ann Arbor markets covered by condition B(viii). It therefore made special provision concerning the time within which to file a petition for rehearing. Thus, the Commission inserted in its order, Paragraph C, quoted in full by petitioners (page 12), for this express and limited purpose: "For the purpose of computing the time within which applications for rehearing may be filed * * *" (R. 455).

Nevertheless Panhandle saw fit to take an appeal to the Court of Appeals for the District of Columbia prior to the issuance of a supplemental order, asserting that it was

[1] Had the Detroit and Ann Arbor markets, or the entire state of Michigan, been excluded, the petitioners would have had no cause for complaint because they bargained concerning a certificate only for a pipe line system "to points of connection with distribution systems in Michigan and Wisconsin, **or either of them**, and at intermediate points" (R. 36).

"aggrieved" by the order of November 30, 1946. In order to appeal a party must show himself "aggrieved" by the order of the Commission. 15 USCA 717r(b). The extent to which Panhandle was in fact aggrieved would appear in the supplemental order which was to be made more precisely defining its rights. In order for there to be a fuller and more complete fixation of its rights the supplemental order was required. In other words, to present more fully the "grievance" of Panhandle and to enable the appellate court to decide in one appeal what action, if any, should be taken concerning that grievance, called for an appeal later wherein the record would include the supplemental order. Moreover, Panhandle was in no danger at that time of irreparable injury as a result of the issuance of the certificate because the construction of the line would take several years. Consequently, the Court of Appeals issued an order of April 21, 1947, dismissing Panhandle's appeal, without prejudice to an appeal when the supplemental order was made more precisely defining Panhandle's rights. The order of the Circuit Court was that Panhandle had not presented a final appealable order whereby it was aggrieved. The Court did not hold that the Commission made no effective order. In holding Panhandle's appeal premature, the Court did not make reference to paragraph C in its order; it took no notice of that paragraph. The Court did not hold that the Commission had not granted a certificate of public convenience and necessity to Michigan-Wisconsin on November 30, 1946. It did not hold that Michigan-Wisconsin was not authorized insofar as the Federal Power Commission was concerned to proceed with the construction of the line on the night of November 30, 1946, as in fact it was.

Petitioners have seen fit to isolate a portion of the brief on behalf of the Commission in this Court relative to

Panhandle's appeal and subsequent petition for a writ of certiorari and assert that the position therein taken by the Commission's attorneys supports the position which the petitioners here assert. That brief not only fails to support the petitioners' position here, but repudiates it. The brief very definitely recognizes and asserts that the Commission issued a certificate of public convenience and necessity to Michigan-Wisconsin on November 30, 1946.

Furthermore, the argument of petitioners that a certificate of public convenience and necessity issued by the Federal Power Commission has to be final in the sense that it is immediately appealable in order to be immediately effective, in order to constitute a present grant, is unsound. No case cited by them so holds, and Congress did not so provide. In fact, Congress expressly provided otherwise. Before an order of the Federal Power Commission can be appealed, a petition for rehearing must be filed and disposed of. 15 USCA 717r. Yet the order issuing a certificate is immediately effective. "The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order." 15 USCA 717r(c).

For a comparatively recent case recognizing that because an order may not be "final" in the sense of being immediately reviewable it does not follow that the order is not immediately effective, attention is called to *Phillips* v. *Securities and Exchange Commission* (2 Cir.), 171 Fed. (2d) 180, 183. See also *Braniff Airways* v. *Civil Aeronautics Board* (App. D. C.), 147 Fed. (2d) 152.

3. A certificate of public convenience and necessity was issued on November 30, 1946, meeting the requirements of the Natural Gas Act.

The basis for the grant of a certificate of public convenience and necessity was prescribed by Congress as follows:

> "* * * a certificate *shall* be issued to any qualified applicant therefor * * * *if* it is found [1] that the applicant is able and willing properly to do the acts and to perform the service proposed * * * and [2] that the proposed service * * * is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." 15 USCA 717f(e), quoted in full in the appendix hereof.

Thus the determination which is to be made in granting or denying a certificate was set forth and, as will have been noted, when the two factors are found to exist the Commission "shall" issue a certificate. This, it has been termed, is the "general mandate" in the Act. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission* (App. D. C.), 169 Fed. (2d) 881, 884, *cert.* den. 335 U. S. 854 (upholding the certificate here involved). See also *Department of Conservation* v. *Federal Power Commission* (5 Cir.), 148 Fed. (2d) 746, 750; *Kentucky Natural Gas Corp.* v. *Federal Power Commission* (6 Cir.), 159 Fed. (2d) 215, 217.

The Commission did not find on November 30, 1946, that if certain conditions later developed it would find the two requisites to exist or that it would later issue a certificate. Quite on the contrary, the Commission found the two requisites to exist on that date and, as was its statutory duty to do, it then issued a certificate. The Commission

did so in clear and unmistakable language (R. 441-445). Cf. *The Deseret Salt Company* v. *Tarpey*, 142 U. S. 241, 249. That which the Commission was charged by Congress to do in issuing a certificate was "completed" on November 30, 1946.

The imposition of conditions in the order issuing the certificate, in line with the established practice of the Commission,[1] did not preclude the then issuance of a certificate. Immediately following the above quoted portion of the Act providing for the issuance of a certificate Congress prescribed:

> "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 USCA 717f(e).

The conditions imposed were to the exercise of rights granted under the single authorization denominated a certificate to "construct and operate" the facilities (R. 441). By them, certain requirements were to be met either before the operation of the system was actually begun or during the operation of the system. Condition B(viii), to which petitioners refer, fell within the latter category as shown in the preceding section of this brief. The Commission did not specify any requirement to be met before commencement of construction. Insofar as authorization from the Federal Power Commission was concerned Michigan-Wisconsin could have started construction on the night of November 30. In fact, Michigan-Wisconsin was required

[1] "The authority in proper cases to attach conditions to the issuance of certificates has been exercised with such regularity that it now has become **standard** practice with the Commission to control all manner of activities and operations." Report of The Committee on Natural Gas in the Proceedings of The Section of Mineral Law (October 29, 1946), of the American Bar Association, page 190. The emphasis is in the report.

to commence construction by a specified date [condition B(x), R. 44]. It did so under the authorization exactly as given to it on November 30, 1946 (R. 189-190, 602).

To be sure, before the actual work of construction could be started, other things had to be done but not insofar as authorization from the Federal Power Commission was concerned. The necessary finances had to be arranged for, and the plan therefor had to be approved by the Securities and Exchange Commission under another and different act of Congress since a holding company was involved. The Federal Power Commission so provided in its order, which would have been the case whether recited in the order or not. 15 USCA 79 *et seq.* But this did not mean that immediate authorization from the Federal Power Commission was not given or that insofar as its permission was concerned Michigan-Wisconsin could not proceed immediately with the project. This did not mean that one commission does not or cannot authorize until the other does. "Congress had not confronted the two Commissions with a dilemma like that created by the famous municipal ordinance requiring that when two trains approach a grade crossing at the same time, both shall stop and neither shall proceed until the other has proceeded." *Panhandle Eastern Pipe Line Co. v. Federal Power Commission, supra*, 169 Fed. (2d) 881, 883. See also *Panhandle Eastern Pipe Line Co. v. Securities and Exchange Commission* (8 Cir.), 170 Fed. (2d) 453, approving the plan of financing of the project here involved. The petitioners bargained for favorable action of only the Federal Power Commission.

The requirement [condition B(ii), R. 442] to the effect that before the facilities could be used certain local authorizations would have to be obtained in Wisconsin for the

conversion from manufactured gas to natural gas in several municipalities in that state, was likewise one that would have been the case whether recited in the order or not. The Natural Gas Act did not purport to usurp state jurisdiction of local features. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 609.

4. The trial court did not abuse its discretion in refusing to dismiss this action.

The trial court undoubtedly had jurisdiction of this cause notwithstanding the two suits which two of the petitioners separately filed in Travis County, Texas. *Kline* v. *Burke Construction Company*, 260 U. S. 226, 230.

Full accord was given by the trial court to the decisions of this Court and of other courts in exercising its discretion in declining to surrender its jurisdiction as to the two petitioners mentioned. This was not a case where the issues could "be better settled" in the proceeding pending in the other court, as discussed in *Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491, 495.

The *Brillhart* opinion clearly recognizes that where a suit in a federal court (1) is "governed by federal law," (2) involves different parties, or (3) could be more conveniently, or with more facility, tried out in the federal court, the discretion of the court should not be exercised by dismissing the suit, but instead the federal court should proceed to determine the case upon its merits. *Not only one, but all three, of those circumstances were present here.* Certainly this action is not a declaratory judgment action that could "serve no useful" purpose, as was the case in the decisions to which petitioners refer.

This case involving an interpretation of federal laws and the effect to be given to them should have been tried out in the first instance by a federal court regardless of the two suits in a state court.

The parties in this case are not the same as those in either of the two state court cases. Here there is an additional party, Magnolia. Here, also, this suit joined as defendants the two parties which were prosecuting separate suits in a state court. By virtue of Rule 20(a) of the Federal Rules of Civil Procedure all interested parties could be joined in this one action so that the entire controversy could be settled as to all such parties in one suit, whereas the issues in the state court actions would be determined only as to part of the interested parties and in two separate actions. The petitioners did not question in the Court of Appeals and do not question here the propriety of the ruling of the trial court that the parties were properly joined in this suit.

Moreover, the contracts involved in this action were made in the Northern District of Oklahoma and the notices of termination were delivered there (R. 605-606). The principal places of business, the headquarters, of the three parties involved in this question, that is, Stanolind, Skelly and Phillips, were located in that district (R. 168-169), and it was to be assumed that there the company records were and there the officers involved and other company personnel to be used as witnesses, possible witnesses or consultants, were available.

As the trial court decided, and the Court of Appeals held (R. 727), the entire controversy could be determined more conveniently and with more facility in this action.

It is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Excerpts From the Natural Gas Act
(15 USCA 717-717w)

Sec. 717f:

* * *

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations:" etc. Provision is then made concerning a natural-gas company previously established.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly:" etc. Provision is made for emergency certificates.

* * *

"(e) Except in the cases governed by the provisions contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation,

construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

"(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

"(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company."

* * *

Section 717o:

"The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. * * * Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe * * *"

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Stanolind Oil and Gas Company)

v.) Civil Action No. 376

Phillips Petroleum Company)

MEMORANDUM OPINION

The Court, having considered the motion of the plaintiff to remand this cause to the State Court, the arguments and briefs of the parties, and the law, finds as follows:

1. The petition and bond for removal were filed too late because they were filed after the time when defendant was required to answer under the State law; that is, after 10 a. m., June 16, 1947.

2. In my opinion plaintiff's original petition discloses a Federal question in that it involves the construction of the Natural Gas Act and of the rules, regulations and orders of the Federal Power Commission issued pursuant to the provisions of that Act.

The Clerk of the Court will accordingly advise the attorneys of record of the findings and conclusions of the Court, and request plaintiff to prepare and submit to the Court, in accordance herewith, order remanding this cause to the 126th District Court of Travis County, Texas.

/s/ Ben H. Rice, Jr.,
United States District Judge.

April 10, 1948.